IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

FAO No. 482 of 2005
and
FAO No. 9 of 2006.

Judgment Reserved on 3.3.2006.

Date of Decision: March _8___,2006

FAO No. 482 of 2005.

Mithnu Ram …Appellant.

Versus.

Moti Ram and others .. Respondents.

FAO No. 9 of 2006

Moti Ram & ors. .. Appellants.

Versus.

Mithnu Ram …Respondents.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge.

Whether approved for Reporting?

For the Appellant(s): **Mr. G.D.Verma, Sr.Advocate with Mr. B.C.Verma, Advocate, for the appellant in FAO No. 482/05 and for Respondent in FAO No.9 of 2006.**

For the Respondent(s): **Mr Rakesh Manta, Advocate, for respondents in FAO No. 482 of 2005 and for the appellants in FAO No. 9 of 2006.**

Deepak Gupta, J.

This judgment shall dispose of two appeals being FAO No.482 of 2005 and FAO No. 9 of 2006 as they are directed against the same

judgment delivered by the District Judge Kinnaur at Rampur in Civil Appeal No.26 of 2005 decided on 23.11.2005 whereby he has set aside the judgment and decree of the trial Court and remanded the suit for decision afresh by the trial Court.

The facts necessary for decision of the case are that Mithnu Ram, hereinafter referred to as the plaintiff filed a suit against Moti Ram and others, hereinafter referred to as the defendants, in the Court of Civil Judge (Senior Division), Kinnaur camp at Rampur for permanent prohibitory injunction claiming that he is owner in possession of the suit land. It is his case that his possession earlier was as non-occupancy tenant and he has acquired proprietary rights over the same.

The suit was contested by the defendants on various grounds and issues were framed. The record of the trial Court reveals that after the issues were framed, the plaintiff only tendered certain documents in evidence and no oral evidence was led. Thereafter the defendants also tendered certain documents in evidence and no other evidence was led. Thereafter the plaintiff filed an application under Section 151 CPC praying that he may be permitted to tender some more documents in evidence. The defendants also filed an application praying that they may be permitted to tender certain documents. The learned trial Court allowed the application filed by the plaintiff and permitted him to file the documents i.e. copy of the judgment and

copy of Rojnamcha and dismissed the application filed by the defendants. Thereafter the suit of the plaintiff was decreed.

The defendants filed an appeal against the judgment and decree passed by the trial Court and the lower appellate court came to the conclusion that the learned trial Court had gravely erred in not giving an opportunity to the defendants to produce any evidence to rebut the evidence permitted to be brought on record on behalf of the plaintiff. The learned lower appellate court held that once the trial court had allowed the plaintiff to lead additional evidence, it should have given an opportunity to the defendants also to lead evidence. The learned lower appellate court, therefore, set aside the judgment and decree of the trial court and remanded the case for this purpose.

FAO No.482 of 2005 has been filed by the plaintiff and FAO No.9 of 2006 has been filed by the defendants.

I have heard Shri G.D.Verma learned senior counsel for the plaintiff and Shri Rakesh Manta, learned counsel for the defendants. Mr. G.D.Verma contends that in fact the plaintiff was entitled to lead rebuttal evidence and there was no need to file an application under Section 151 CPC for leading additional evidence. He submits that since the documents were tendered basically in rebuttal, therefore, the order of the learned lower appellate court is illegal and liable to be set aside. In the alternative, he contends that instead of making a wholesale remand of the case, the learned lower appellate court should have permitted the defendants to lead their evidence before it.

As far as Mr.Rakesh Manta is concerned, he submits that in fact the trial court had erred in permitting the plaintiff to produce more documents. He also submits that an application which was by way of leading additional evidence could not have been allowed since the provisions of Order 18 rule 16A CPC stood deleted. According to him, there was no need to remand the case.

I have heard the arguments and gone through the record. In view of the judgment of the Apex Court in **Salem Advocate Bar Association, T.N.** versus **Union of India** (2005) 6 SCC 344, the trial court was justified in permitting the plaintiff to file the documents. One of the documents is a certified copy of a judgment and the other document is a copy of Rojnamcha which is also a public document. Whether the contents of Rojnamcha can be read in evidence and what is the evidentiary value thereof is an issue which the court below shall decide. However, the learned lower appellate court was absolutely correct in holding that once an opportunity was given to the plaintiff to file certain documents, the defendants should have also been given an opportunity to rebut the said evidence. I am not at all in agreement with the contention of Mr. Verma that the evidence was produced by way of rebuttal. Admittedly, these documents were not on record. As per the provisions of the CPC, all documents have to be filed along with the suit. The documents can be filed lateron only with the permission of the court. Therefore, once the permission was granted to the plaintiff to produce and prove fresh documents the principles of

natural justice required and that such an opportunity should have been granted to the defendants also. There can be no dispute with regard to this.

The question that arises is whether the judgment itself required to be set aside and the case remanded or whether the lower appellate court itself should have recorded the said evidence. Order 41 rule 23A CPC provides that whole sale remand is to be done only in a case where retrial is necessary. There is no need to frame any additional issues in the case and only additional evidence is to be recorded. Therefore, the lower appellate court should have either recorded the evidence itself or should have called for the evidence from the trial court.

As far as the defendants are concerned, I find that even before the trial court, they did not want to lead any oral evidence and only wanted to file some documents. They can be permitted to file the said documents and the same will be exhibited if permissible under law. The defendants cannot be permitted to lead oral evidence since they have not made any prayer in this regard before the trial court. After the documents are permitted to be filed, the lower appellate court itself shall decide the matter itself.

In view of the above discussion, both the appeals are disposed of accordingly and the order of the learned lower appellate court is set aside in so far as it remanded the case to the trial Court. The defendants shall be permitted to file documents, if any, before the

learned lower appellate court and the documents which are admissible in evidence shall be exhibited and the matter shall be heard by the learned lower appellate court.

The parties are directed to appear before the learned lower appellate court on 10th April, 2006. The learned lower appellate court is directed to dispose of the matter expeditiously and in any event, not later than 30th June, 2006. The records of the case be returned forthwith to the court below so as to reach there well before the date fixed.

March __8___, 2006 (Deepak Gupta),
s. Judge.